Consolidated Appeals No. 24-CV-1163 & No. 24-CV-1173

DISTRICT OF COLUMBIA COURT OF APPEALS

DTLD, LLC, *et al.*,
Appellants,

v.

POWER STATION LIMITED PARTNERSHIP, *et al.*,
Appellees.

JPMORGAN CHASE BANK, N.A.,
Appellant,

v.

DTLD, LLC, *et al.*,
Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division No. 2023-CAB-006784 (Hon. Carl E. Ross, Judge)

REPLY BRIEF OF APPELLANT JPMORGAN CHASE BANK, N.A.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

In the event that this Court remands this case to the Superior Court, Appellant JPMorgan Chase Bank, N.A. ("JPMorgan") respectfully maintains that this Court find that JPMorgan is entitled to intervene and participate in the litigation. Nothing in the opposing brief filed by Defendants-Appellees DTLD, LLC, and Iraklion, LLC ("Defendants") changes this conclusion.

First, the Superior Court's order denying JPMorgan's intervention is subject to this Court's appellate review. Defendants argue that this Court cannot review the Superior Court's order denying JPMorgan's motion to intervene because the Superior Court did not substantively analyze JPMorgan's motion and the matter was "not decided" below. Answering Br. at 4–6. With this specious argument, Defendants twist the well-established principle requiring litigants to articulate issues below to preserve them for appeal into a novel rule that *lower courts* must do the same. This is not the law, and the authorities Defendants cite only address appellate review of arguments first raised on appeal—not orders denying motions as moot in a final order.

Contrary to Defendants' argument, the Superior Court's order is properly subject to this Court's appellate review. Orders denying leave to intervene as of right are appealable final orders, and this Court routinely considers Superior Court orders denying motions as moot. Indeed, under Defendants' argument, Superior Court

judges could insulate their decisions from appellate review by simply issuing summary orders barren of analysis or reasoning. Moreover, although the Superior Court's order did not substantively weigh JPMorgan's motion to intervene, it still "resolved" and "decided" the motion by denying it. Accordingly, the denial of JPMorgan's motion to intervene is properly appealable and Defendants' argument to the contrary lacks merit.

Second, JPMorgan has satisfied the factors for intervention under both Superior Court Civil Rule 24(a) and Rule 24(b) and is entitled to intervene. Defendants argue that intervention should be denied because JPMorgan knew about its interests implicated in this litigation months before moving to intervene, and these interests are already fully represented by the existing Plaintiffs-Appellees Power Station Limited Partnership, Southern Building Associates, LLP, SJG Properties, LLC, and 15th and H Street Associates, LLP (collectively, the "Plaintiffs"). Crucially, however, Defendants misapprehend the nature of JPMorgan's interests. Although the other Plaintiffs have interests in property near the location for Defendants' proposed nightclub, JPMorgan is the only entity in this litigation with property that *directly abuts* the proposed nightclub's location. Thus, JPMorgan has materially distinct, and heightened, property interests from the other Plaintiffs.

In addition to these property interests, JPMorgan also participated in the protest effort before the D.C. Alcoholic Beverage and Cannabis Board (ABC Board)

to challenge Defendants' application to transfer a nude dancing alcoholic beverage license to the property. JPMorgan's participation in the ABC Board proceeding was implicated in this litigation when Defendants filed their summary judgment papers, arguing for the first time that the ABC Board's decision has preclusive force. Upon learning of this litigation position, JPMorgan promptly moved to intervene to ensure accurate representation of the ABC Board proceeding and vindicate its unique property interest as an abutting property owner. Although Defendants overlook these valuable interests and JPMorgan's timely efforts to protect them, JPMorgan has nonetheless satisfied the requirements of both Rule 24(a) and Rule 24(b). Accordingly, if this Court ultimately remands this case for further proceedings, JPMorgan requests that this Court also find that JPMorgan is entitled to intervene in the litigation.

II. ARGUMENT

A. The Superior Court's Order Denying Intervention Is Subject to This Court's Appellate Review.

Defendants first argue that this Court cannot even consider the Superior Court's order denying intervention because the Superior Court did not "resolve" or "decide" the issue. Answering Br. at 4–9. Because the Superior Court denied JPMorgan's motion as moot, Defendants contend that it did not substantively weigh, analyze, or even consider the motion to intervene. Thus, according to Defendants,

JPMorgan's appeal is improper because it asks this Court to decide the intervention motion "in the first instance." This is baseless.

Defendants' argument is flawed in several respects, principally because it lacks supporting authority. Defendants base this argument on the apparent principle that this Court cannot consider "[a] matter not decided in the lower court" or "issues that were not addressed by the lower court." Answering Br. at 4, 6. But Defendants graft this novel rule from the well-established principle that this Court generally cannot "consider an argument that is raised for the first time on appeal." *Tilley v. United States*, 238 A.3d 961, 969 (D.C. 2020) (quoting *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 34 n.3 (D.C. 2001)); *D.D. v. M.T.*, 550 A.2d 37, 47–48 (D.C. 1988) (addressing "scope of our authority to consider [two arguments] for the first time at so late a stage in the case"); *John C. Flood of MD, Inc. v. Brighthaupt*, 122 A.3d 937, 943–44 (D.C. 2015) (finding litigant "forfeited this argument by failing to raise it before the trial court").[1] These cases do not, as

[1] Defendants' citation to *Folks v. District of Columbia*, 93 A.3d 681 (D.C. 2014) does not offer the asylum Defendants seek either. In that case, this Court declined to resolve an alternative summary judgment argument that "[t]he trial court did not definitively resolve," *id.* at 686, but *not* because the Superior Court issued a cursory order or left the matter unaddressed, as Defendants suggest, Answering Br. at 6. Rather, because the defendant's motion did "not provide the Court with sufficient information" regarding the alternative summary judgment argument, the Superior Court expressly stated it was "unable to make any decision on this issue at this time." *Folks v. District of Columbia*, No. 2012-CA-003033-B, slip op. at 4 (D.C. Super. Ct. May 21, 2013). Accordingly, because the defendant did not sufficiently articulate the argument below, neither the Superior Court nor this Court could adjudicate the

Defendants suggest, reflect that a cursory trial court order denying a motion as moot eludes appellate review because the analysis is thin or absent. If this were the rule, trial courts could insulate all decisions from appellate scrutiny by simply issuing summary, *ipse dixit* orders.

Defendants then claim that this Court can only consider the Superior Court's order denying JPMorgan's motion to intervene if this is an "exceptional case," Answering Br. at 6–9, but Defendants again misstate the rule. Defendants pull this language from *Tilley v. United States*, where this Court announced an exception to the "usual rule" that courts will not "consider an argument that is raised for the first time on appeal." 238 A.3d at 969 (quoting *Helen Dwight Reid Educ. Found.*, 766 A.2d at 34 n.3). And in that case, this Court allowed the appellant to raise a substantive due process argument for the first time on appeal because it was "indeed an exceptional case." *Id. Tilley* had nothing to do with the appealability of an order denying a motion as moot, and certainly did not hold—as Defendants suggest—that such orders are only reviewable in "exceptional cases."

To the contrary, this Court routinely reviews Superior Court orders denying motions as moot. *See, e.g.*, *Oji Fit World, LLC v. District of Columbia*, 325 A.3d 392, 402 (D.C. 2024) (considering, and ultimately affirming, appeal of order denying

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issue. Here, however, the Superior Court altogether denied JPMorgan's motion to intervene, and thus "definitively resolve[d]" the motion. *Folks*, 93 A.3d at 686.

"motion to compel discovery . . . as moot"); *Copeland v. Cohen*, 905 A.2d 144, 146 n.3 (D.C. 2006) (considering and affirming order denying motion for leave to amend complaint as moot because "we see no abuse of discretion in that decision"); *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 727–28 (D.C. 2011) (considering and affirming order denying motion for jurisdictional discovery as moot because the trial court did not "abuse its discretion"); *Freyberg v. DCO 2400 14th St., LLC*, 304 A.3d 971, 982 (D.C. 2023) (considering and affirming order denying motion to file sur-reply as moot because "[t]he trial court acted within its discretion"). Indeed, in *Francis v. Rehman*, 110 A.3d 615 (D.C. 2015), this Court refused to consider arguments relating to a motion denied as moot because the appellee did not appeal that order. There, after the appellant moved to voluntarily dismiss, the appellees filed a motion for summary judgment, but because the judge "granted appellants' motion to voluntarily dismiss, he denied appellees' summary judgment motion as moot." *Id.* at 619. On appeal, the appellees attempted to challenge the sufficiency of the dismissed claims, but this Court did "not consider those arguments since appellees did not appeal from Judge Okun's order denying as moot their motion for summary judgment." *Id.* Thus, it is clear in this District that orders denying motions as moot, such as the Superior Court's order denying JPMorgan's motion to intervene, are properly appealable and subject to this Court's review.

Moreover, Defendants' argument that JPMorgan's motion to intervene was not "resolved" or "decided" is meritless. This Court has jurisdiction of appeals from, inter alia, "all final orders and judgments of the Superior Court of the District of Columbia." D.C. Code § 11-721(a)(1). As JPMorgan explained in its opening brief, an "order denying the motion for leave to intervene as of right pursuant to Super. Ct. Civ. R. 24(a) is appealable to this court as a final order." *McPherson v. D.C. Hous. Auth.*, 833 A.2d 991, 994 (D.C. 2003) (citing *Vale Props., Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 (D.C. 1981)); *see also Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 798 n.9 (D.C. 1975) ("Denial of leave to intervene as of right is a final order appealable immediately to this court."). Although the Superior Court did not explicitly analyze JPMorgan's arguments in the order denying the motion to intervene, it nonetheless *denied the motion*. This order unequivocally "resolved" and "decided" JPMorgan's motion to intervene, and is therefore a final order subject to this Court's appellate jurisdiction. *See Francis*, 110 A.3d at 619 (holding appellee waived arguments related to order denying motion as moot because the order was not appealed).

For these reasons, the Superior Court's order denying JPMorgan's motion to intervene as moot is appealable and reviewable by this Court, and Defendants' arguments to the contrary are baseless.

B. The Superior Court Should Have Granted JPMorgan's Motion to Intervene.

As discussed in the opening brief, the Superior Court should have granted JPMorgan's motion to intervene under either Rule 24(a) or Rule 24(b), and Defendants' arguments in opposition are unavailing.

To intervene as of right, Rule 24(a) first requires a "timely motion." There is no bright-line rule or deadline for a motion to intervene; instead, "timeliness is to be determined from all the circumstances." *Anderson v. D.C. Hous. Auth.*, 923 A.2d 853, 866 (D.C. 2007) (citing *Emmco Ins. Co. v. White Motor Corp.*, 429 A.2d 1385, 1387 (D.C. 1981)). This involves considering the following factors: "(1) the length of the intervenor's delay; (2) the reason for the delay; (3) the stage to which the litigation had progressed when intervention was sought; (4) the prejudice that the original parties may suffer if the application is granted; and (5) the prejudice that the intervenor may suffer if its application is denied." *Id.* (citing *Emmco Ins. Co.*, 429 A.2d at 1387). The length of delay is measured *not* from the date of the litigation itself, but when the applicant knew or reasonably should have known that its interests would be affected by the litigation. *Id.*; *Mokhiber v. Davis*, 537 A.2d 1100, 1104 (D.C. 1988).

Additionally, when there is a request for permissive intervention, courts typically consider both timeliness and undue delay or prejudice together as part of a five-factor test examining: (1) the length of delay in filing the application; (2) the

reason for the delay; (3) the stage to which the litigation had progressed when intervention was sought; (4) prejudice to the original parties if intervention is permitted; and (5) prejudice to the intervenor if intervention is denied. *Emmco Ins. Co.*, 429 A.2d at 1387. These factors "allow the court to evaluate the justice and efficiency of permitting intervention in a particular lawsuit." *Mokhiber*, 537 A.2d at 1104. The concern is not whether having a proper adjudication might "delay" a party's preferred schedule, but whether an intervenor truly "slept on her rights before asserting her interest" in the litigation. *Robinson v. First Nat'l Bank of Chi.*, 765 A.2d 543, 545 (D.C. 2001).

Defendants argue that intervention was properly denied because (1) JPMorgan knew of this case 18 months ago and its motion was untimely, (2) JPMorgan has no reasonable excuse for the delay in moving to intervene, (3) the litigation had advanced and intervention would prejudice Defendants, and (4) JPMorgan's interests were adequately represented by the current Plaintiffs. As shown below, all of these arguments lack merit.

1. JPMorgan's Motion Was Timely.

First, Defendants argue that JPMorgan's motion to intervene was untimely because it should have known its interests were implicated in this litigation when the case was filed in November 2023, or at least when the first ABC Board hearing occurred in February 2024. Answering Br. at 10–13. Defendants also argue that

JPMorgan has no "reasonable excuse" for this delay. *Id.* at 13–14. Nonetheless, Defendants paint in broad strokes and continue to overlook JPMorgan's precise interests at stake in this litigation.

While JPMorgan has an interest in this litigation as the only entity owning property directly abutting the proposed nightclub's location, it also has an interest through its participation in the ABC Board proceedings as a protestant challenging Defendants' license transfer application. When Plaintiffs filed the complaint in this litigation, ABC Board application was not implicated, and JPMorgan could not have known the issue would arise. Even by the time of the first ABC Board hearing in February 2024, the issue did not appear in this litigation. After Defendants filed their summary judgment papers, however, JPMorgan first learned that Defendants sought to inject the ABC Board decision into this litigation and argue that the administrative ruling carried preclusive force. Upon learning this new information, JPMorgan promptly moved to intervene in the lawsuit to protect its property interest and ensure that the ABC Board proceedings were accurately represented.

Defendants argue that JPMorgan "simply chose to sit on its hands," but that is not true. Answering Br. at 12. Courts have found intervention following summary judgment motions to be timely where the applicants learned of the basis for intervention from the summary judgment filings. *See D.C. Bd. of Elections & Ethics v. Jones*, 481 A.2d 456, 460–61 (D.C. 1984) (permitting intervention after cross-

motions for summary judgment were filed); *Grumman Flxible Corp. v. Dole*, 102 F.R.D. 36, 38 (D.D.C. 1983) ("[I]t would have been difficult, if not impossible, however, for RTA to determine whether its interests would be adequately represented in this action until the defendant filed its motion for summary judgment.").[2] Moreover, courts have consistently found applications filed within one month of the applicant learning of its unprotected interest to be timely. *Robinson*, 765 A.2d at 545 (just under one month); *Appleton v. F.D.A.*, 310 F. Supp. 2d 194, 196–97 (D.D.C. 2004) (two months); *Bible Way Church of Our Lord Jesus Christ World Wide, Inc. v. Showell*, 260 F.R.D. 1, 5 (D.D.C. 2009) (fifteen months after complaint). Here, JPMorgan sought to intervene within only two weeks of the parties' summary judgment filings. Thus this is not a situation where JPMorgan "slept on [its] rights before asserting [its] interest in the property." *Robinson*, 765 A.2d at 545.

Lastly, Defendants argue that "JPMorgan apparently wants to relitigate the findings made by the [ABC] Board," but this is also false. Answering Br. at 12. To the contrary, Defendants—not JPMorgan—attempt to resurrect the ABC Board's irrelevant findings and incorporate them into this litigation. JPMorgan, on the other

[2] "Super. Ct. Civ. R. 24 is identical in all relevant respects to Fed. R. Civ. 24, and accordingly, we look to federal court decisions as persuasive authority in interpreting it." *Vale Props.*, 431 A.2d at 14.

hand, seeks to keep the two matters separate, and sought intervention to prevent Defendants' continued efforts to improperly mix the two.

For these reasons, in addition to those stated in JPMorgan's opening brief, JPMorgan's motion to intervene was timely filed.

2. JPMorgan's Intervention Would Not Prejudice Defendants.

Next, Defendants argue that JPMorgan's motion to intervene was properly denied because 'this case was so far advanced" and intervention would have prejudiced Defendants. Answering Br. at 14–16. Defendants again exaggerate the timeline in this litigation, as JPMorgan sought to intervene at an early stage in the case and would not have injected new issues into the litigation.

JPMorgan sought to intervene less than eleven months after the complaint was filed in this action, prior to mediation, and before the court issued a summary judgment decision. *See Mokhiber*, 537 A.2d at 1104–05 (allowing intervention following *final* judgment); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (same). Accordingly, this eleven-month-old litigation had not ossified such that JPMorgan's involvement would have upended the proceedings. The case was still in its infancy, and courts have allowed intervention at far later stages. *See Mokhiber*, 537 A.2d at 1104–05; *Smoke*, 252 F.3d at 471.

Additionally, Defendants claim that JPMorgan's intervention would be prejudicial because JPMorgan "offers no limiting conditions," and its "entry into the

case would require separate briefing, factual development, and potentially duplicative discovery." Answering Br. at 15–16. These fears are speculative and unfounded, and disregard that JPMorgan "simply sought to participate in future motions practice, mediation, and trial." JPMorgan Br. at 16. JPMorgan's limited participation in this litigation would not prejudice Defendants, and Defendants' argument to the contrary is merely conjecture.

3. JPMorgan's Unique Interests Are Not Adequately Represented by Current Plaintiffs.

Finally, Defendants argue that JPMorgan's motion was properly denied because its interests are adequately represented by current Plaintiffs. Answering Br. at 16–18. Yet again, however, Defendants misapprehend JPMorgan's unique interests at stake in this litigation.

Defendants argue that "[t]here is no difference" between JPMorgan and the current Plaintiffs because the other Plaintiffs "also own property immediately adjacent to 1412 Eye Street." Answering Br. at 17. This is incorrect. While the other Plaintiffs own property located nearby the proposed nightclub's location, they do not own lots that are directly adjacent, as there are intervening public alleys that separate 1412 Eye Street from all other lots in Square 220. JPMorgan, on the other hand, is the only entity in this litigation with property situated within Square 220 that *directly abuts* the proposed nightclub's location. This is a material difference. The other Plaintiffs do not face the same exposure as JPMorgan if the nightclub were

to open. Defendants will undoubtedly seek to use JPMorgan's abutting property vis-à-vis the alleyway, thus, JPMorgan may legitimately face premises liability risks that none of the other Plaintiffs share, including liability for intervening criminal acts by third parties. Because none of the existing Plaintiffs own property directly abutting Defendants' proposed nightclub, JPMorgan's heightened property interests are not currently represented in this litigation.

For these reasons, and those stated in JPMorgan's opening brief, its interests are not adequately represented by the current Plaintiffs in this litigation.

III. CONCLUSION

For these reasons, in addition to those raised in JPMorgan's opening brief, JPMorgan respectfully requests that in the event this case is remanded to the Superior Court for further proceedings, this Court also find that JPMorgan is entitled to intervene in the litigation.

Date: June 20, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on June 20, 2025, a copy of the foregoing was filed and served upon counsel for all parties via the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and length requirements of Rule 32(a)(4), (5) because it is prepared in 14-point Times New Roman font and does not exceed 20 pages in length, excluding those portions exempted from the page length set forth in Rule 32(a)(5).

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